Filed 11/28/16 P. v. Doria CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. JULIO C. DORIA, Defendant and Respondent.	E065879 (Super.Ct.No. ICR25454) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

Michael A. Hestrin, District Attorney, Donald W. Ostertag, Deputy District Attorney, for Plaintiff and Appellant.

Reed Webb, under appointment by the Court of Appeal, for Defendant and Respondent.

The People appeal from the trial court's order granting defendant and respondent Julio C. Coria's petition to reduce his felony conviction of second degree burglary to misdemeanor shoplifting under Proposition 47. The People argue defendant entered the

department store with the intent to commit conspiracy, and thus is not eligible under Penal Code section 1170.18.[1] For the reasons explained *post*, we affirm.

FACTS AND PROCEDURE

On the afternoon of August 11, 1996, defendant and a female companion (his codefendant) were in a J.C. Penney department store. A loss prevention officer saw them enter the junior's department. The codefendant took a pair of shorts from a hanger, folded the shorts and placed the shorts in a Robinsons-May shopping bag that defendant carried. They went to the men's department, where defendant picked up a pair of pants, folded them and placed them in the same shopping bag. The officer contacted mall security and then saw defendant and codefendant leave the store without paying for the items. The officer confronted them. Defendant dropped the two shopping bags he was carrying and attempted to punch the officer, but missed. Defendant then ran into the parking lot, where he was arrested by mall security. After escorting defendant and the codefendant to the store's security office, the officer found in the two bags items from JC Penney, Robinsons-May and Record Alley, with no receipts. The officer contacted the two other stores and confirmed the items had been stolen, along with a pair of Nike Air shoes defendant was wearing, which had been stolen from Robinsons-May. The combined value of the items, not including the shoes, was $322.95.

On August 13, 1996, the People filed a complaint charging defendant and codefendant with felony second degree commercial burglary (§ 459) and misdemeanor

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[1] All section references are to the Penal Code unless otherwise indicated.

petty theft of merchandise not exceeding $400 in value (§490.5).[2] On October 17, 1996, defendant pled guilty to the burglary charge only. The court sentenced defendant to three years of probation and ordered him to serve 210 days in jail

On July 21, 2015, defendant filed a petition under section 1170.18 asking to have the burglary conviction reduced to a misdemeanor under Proposition 47 because defendant "believe[d] the value of the check or property [did] not exceed $950." On December 21, 2015, the People filed a response asking for a hearing to determine the value of the items stolen. At a hearing held on February 26, 2016, the People conceded the amount stolen was less than $950, but argued defendant and the woman with him at the store had committed conspiracy to commit misdemeanor shoplifting, which was a felony. The superior court reasoned that case law supporting such an outcome involved the actual filing of a conspiracy charge, whereas the People had not filed a conspiracy charge in this matter. The court granted the petition.

This People's appeal followed.

DISCUSSION

The People first argue that defendant failed to meet his initial burden to prove to the trial court that the underlying facts of the second degree burglary qualify it for reduction to a misdemeanor under Proposition 47, including the dollar value of the merchandise he stole and the nature of his entry into the department store. However, the People requested a hearing rather than raising this point in their response. In addition, the

[2] The only references in the record to the codefendant are in the complaint and police report.

People conceded at the hearing that the value of the merchandise was under $950. The police report was provided to the court at the hearing, so both the value of the merchandise and the details of the entry into the department store were available to the trial court, as they are to this court. The relevant underlying facts of the burglary were well established, and so we turn to the substantive issue in this appeal—whether the People's new theory, previously uncharged and unproven, that defendant committed conspiracy disqualifies him from having his second degree burglary conviction reduced to misdemeanor shoplifting.

Applicable Law

" 'On November 4, 2014, the voters enacted Proposition 47, "the Safe Neighborhoods and Schools Act" (hereafter Proposition 47), which went into effect the next day. [Citation.]' [Citation.] Section 1170.18 'was enacted as part of Proposition 47.' [Citation.] Section 1170.18 provides a mechanism by which a person currently serving a felony sentence for an offense that is now a misdemeanor, may petition for a recall of that sentence and request resentencing in accordance with the offense statutes as added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in subdivision (a) of section 1170.18, shall have his or her sentence recalled and be 'resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' [Citation.]" (*T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 649, fn. 2 (*T.W.*).)

"Section 1170.18, subdivision (a) provides: 'A person currently serving a sentence for a conviction, *whether by trial or plea*, of a felony or felonies who would

have been guilty of a misdemeanor under the act that added this section ("this act") had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing . . . .' " (*T.W., supra,* 236 Cal.App.4th at p. 651.)

"[S]ection 1170.18 clearly and unambiguously states, 'A person currently serving a sentence for a conviction, *whether by trial or plea'* of eligible felonies may petition for resentencing to a misdemeanor. [Citation.]" (*T.W., supra,* 236 Cal.App.4th at p. 652.) "After a petitioner is found to be eligible, the trial court must grant the petition for reduction of sentence unless the court finds in its discretion that the petitioner poses an unreasonable risk of committing a very serious crime. [Citation.] The statute does not otherwise automatically disqualify a petitioner and nothing in section 1170.18 reflects an intent to disqualify a petitioner because the conviction was obtained by plea agreement." (*Ibid.*) Thus, a defendant is "entitled to petition for modification of his sentence, notwithstanding the fact his conviction was obtained by a plea agreement." (*Id.* at p. 653, fn. omitted.)

Similarly, a defendant who has completed a sentence for a crime may file an application under Proposition 47 to reduce his or her felony conviction to a misdemeanor. Section 1170.18, subdivision (f), states: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as

misdemeanors." Subdivision (g) of section 1170.18 provides: "If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor."

Among the crimes reduced to misdemeanors by Proposition 47 "are certain second degree burglaries where the defendant enters a commercial establishment with the intent to steal. Such offense is now characterized as shoplifting as defined in new section 459.5." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 (*Sherow*).) Section 459.5, subdivision (a), provides: "Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary." "Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property." (§ 459.5, subd. (b).)

In the instant case, when defendant requested his felony burglary conviction be reduced to misdemeanor shoplifting under Proposition 47, he had already completed his sentence on the burglary conviction. Therefore his request was an application for redesignation under subdivisions (f) and (g) of section 1170.18 (a felony reduction application).

Conspiracy to Commit Burglary

The People contend defendant's commercial burglary conviction is not eligible for reduction to misdemeanor shoplifting under Proposition 47 because the crime was a conspiracy. The People argue it is irrelevant that they did not allege conspiracy in the complaint and that his conduct remains felony conduct. We disagree.

"Conspiracy is an inchoate crime. [Citation.] It does not require the commission of the substantive offense that is the object of the conspiracy. [Citation.] 'As an inchoate crime, conspiracy fixes the point of legal intervention at [the time of] agreement to commit a crime,' and 'thus reaches further back into preparatory conduct than attempt . . . .' [Citation.]" (*People v. Swain* (1996) 12 Cal.4th 593, 599-600 (*Swain*).)

A conspiracy is defined as " 'two or more persons conspir[ing]' '[t]o commit any crime,' together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance thereof. (Pen. Code, §[§] 182, subd. (a)(1), 184.) 'Conspiracy is a "specific intent" crime. . . . The specific intent required divides logically into two elements: (a) the intent to agree, or conspire, and (b) the intent to commit the offense which is the object of the conspiracy. . . . To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree but also that they intended to commit the elements of that offense.' [Citation.] In some instances, the object of the conspiracy 'is defined in terms of proscribed conduct.' [Citation.] In other instances, it 'is defined in terms of . . . a proscribed result under specified attendant circumstances.' [Citation.]" (*Swain*, *supra*,

12 Cal.4th at p. 600.) "Proposition 47 does not apply to convictions for conspiracy." (*People v. Segura* (2015) 239 Cal.App.4th 1282, 1284.)

Like aiding and abetting, conspiracy is itself a theory of liability. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1201 (*Hajek & Vo*), overruled on other grounds in *People v. Rangle* (2016) 62 Cal.4th 1192, 1216.) We recognize conspiracy need not in all instances be charged, so long as the defendant is put on notice the prosecution is asserting the theory against the defendant. (*Ibid.*) In *Hajek & Vo*, the defendants argued that "the use of an uncharged conspiracy violated due process by depriving them of notice of the charges against them." (*Ibid.*) The court rejected the argument, stating that " ' "Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." ' " (*Ibid.*) The court concluded the defendants were so advised because, "[b]y the time the trial began, defendants were well aware the prosecutor intended to proceed on a conspiracy theory to establish derivative liability." (*Ibid.*)

This was not the case in the instant matter. In the complaint, the People do not allege defendant conspired with his codefendant to commit the burglary. The complaint neither specifies nor even mentions a conspiracy. Count 1 states that defendant and his codefendant willfully and unlawfully entered the JC Penney with intent to commit theft. Count 2 states defendant and his codefendant willfully and unlawfully stole and took merchandise belonging to JC Penney.

Unlike in *Hajek & Vo, supra*, 58 Cal.4th 1144, there was no preliminary hearing or trial. There being no evidence in the record to the contrary, we must conclude that at the time defendant pled guilty and was sentenced, he did not receive notice he was being charged with committing a conspiracy. Therefore, regardless of whether there was admissible evidence supporting a conspiracy conviction, defendant is not barred from reducing his felony burglary conviction to misdemeanor shoplifting. Holding otherwise would violate defendant's due process rights to proper notice of being charged with a conspiracy.

Furthermore, allowing the People to establish ineligibility for sentence reduction based on conspiracy, after defendant pled guilty to burglary, with intent to commit a theft, not a conspiracy, would violate double jeopardy and fair trial principles. Double jeopardy forbids a second trial for the purpose of affording the People a second opportunity to provide evidence it failed to produce in the first proceeding. (*Burks v. United States* (1978) 437 U.S. 1, 11.) Section 654, subdivision (a) "provides that '[a]n acquittal or conviction and sentence under any one [provision of law] bars a prosecution for the same act or omission under any other.' In *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 827 [], the court stated that '[w]hen, as here, the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence.' " (*Sanders v.*

Superior Court (1999) 76 Cal.App.4th 609, 614, fn. omitted; in accord, *People v. Hamernik* (2016) 1 Cal.App.5th 412, 427-428.) The People's failure to charge defendant with a conspiracy and prosecute him for that offense bars the People from postconviction reliance on the uncharged theory of conspiracy as a basis for preventing him from benefiting from sentence reduction under Proposition 47.

Accordingly, we conclude the trial court did not err in finding defendant's felony commercial burglary conviction was eligible for reduction to a misdemeanor under Proposition 47.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.